Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2000

DERRICK MICHAEL MCCAIN,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

Petitioner was convicted of one count of conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846, and was sentenced to 25 years imprisonment under 21 U.S.C. § 841(b)(1)(A) (authorizing a sentence of 10 years to life) based on the district judge's finding, by a preponderance of the evidence, that specific drug quantities should be attributed to Petitioner. On Petitioner's appeal, the court of appeals held that the district judge's determination of quantity on a preponderance standard did not violate the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The court ruled that the imposition of sentence under Section 841(b)(1)(A) was not plain error, notwithstanding *Apprendi*, because the sentence did not exceed the 30-year maximum that could have been imposed under 21 U.S.C. § 841(b)(1)(C) without regard to drug quantity. The court rejected Petitioner's contention that the applicable statutory maximum under Section 841(b)(1)(C) was 20 years, not 30 years, because it concluded that the fact of Petitioner's prior conviction did not have to be charged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. The issues are:

1. Where particular types and quantities of drugs involved in a violation of 21 U.S.C. §§ 841 & 846, if proved, authorize increases in the statutory maximum sentence from 20 years to 40 years or life imprisonment, do the Fifth and Sixth Amendments require those types and quantities to be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt?

2. Where the fact of prior felony drug conviction, if proved, authorizes an increase in the statutory maximum sentence from 20 years to 30 years imprisonment, do the Fifth and Sixth Amendments require that fact to be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt, notwithstanding *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)?

PARTIES TO THE PROCEEDING

Pursuant to S. Ct. R. 14.1(b), Petitioner states that the names of all parties to the proceeding appear in the case caption.

TABLE OF CONTENTS

Opinions Below 1

Statement of Jurisdiction 1

Statutory and Constitutional Provisions at Issue 2

Statement of the Case 2

Reasons for Granting the Writ 5

I. The Constitution Requires The Types And Quantities Specified In Subparagraphs 841(b)(1)(A) And (B) To Be Treated As Elements Of The Offense Defined In Subsection 841(a) 5

A. The Facts Of Prior Conviction And Narcotics Type And Quantity, Where Proved, Expose A Defendant To Greater Maximum Punishment 5

B. Because Proof Of Narcotics Type And Quantity Alters The Statutory Maximum Sentence, Those Facts Must Be Considered Elements Of The Offense 8

II. The Constitution Requires The Fact Of Prior Felony Conviction To Be Treated As An Element Of The Offense Defined In Subparagraph 841(b)(1)(C) 10

Conclusion 21

TABLE OF AUTHORITIES

Cases

Agostini v. *Felton*,
521 U.S. 203 (1997) 19

Almendarez-Torres v. *United States*,
523 U.S. 224 (1998) ..... *passim*

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) ..... *passim*

Cruz-Aguilar v. *United States*, No. 00-10441,
2001 WL 820918 (9th Cir. July 19, 2001) 15

Dahler v. *United States*, No. 01-2591,
2001 WL 827643 (7th Cir. July 17, 2001) 14

Duncan v. *Louisiana*,
391 U.S. 145 (1968) 9

Hoffman v. *Arave*,
236 F.3d 523 (9th Cir. 2001) 15

Jones v. *United States*,
530 U.S. 1271 (2000) 8

Jones v. *United States*,
526 U.S. 227 (1999) 4

State Oil Co. v. *Khan*,
522 U.S. 3 (1997) 19

Stirone v. *United States*,
361 U.S. 212 (1960) 9

Sullivan v. *Louisiana*,
508 U.S. 275 (1993) 9

United States v. *Abundis-Quesedas*, No. 00-3580,
2001 WL 214086 (8th Cir. Mar. 6, 2001) 14

United States v. *Aguayo-Delgado*,
220 F.3d 926 (8th Cir. 2000) 6, 9, 14

United States v. *Aguilar-Neri*, No. 01-1002,
2001 WL 792555 (8th Cir. July 16, 2001) 14

United States v. *Aguilar-Rodriguez*, No. 99-10574,
2001 WL 83199 (9th Cir. Jan. 31, 2001) 18

United States v. *Aguirre-Rea*, No. 00-50486,
2001 WL 599242 (9th Cir. June 1, 2001) 16

United States v. *Aguirre-Trueva*, No. 00-50369,
2001 WL 599246 (9th Cir. June 1, 2001) 16

United States v. *Alamanza-Antuna*, No. 00-4129,
2001 ML 46313 (10th Cir. Jan. 19, 2001) 19

United States v. *Alcantar-Murillo*, No. 00-50146,
2001 WL 408786 (9th Cir. Apr. 19, 2001) 16

United States v. *Alexander*, No. 99-50681,
2001 WL 291045 (9th Cir. Mar. 22, 2001) 17

United States v. *Almendarez*, No. 00-4421,
2001 WL 37544 (4th Cir. Jan. 16, 2001) 14

United States v. *Alvarado*, No. 00-50226,
2001 WL 180407 (9th Cir. Feb. 23, 2001) 17

United States v. *Alvarado-Gongora*, No. 99-50782,
2001 WL 180570 (9th Cir. Feb. 22, 2001) 17

United States v. *Alvarez-Gonzalez*, No. 00-50165,
2001 WL 180367 (9th Cir. Feb. 23, 2001) 17

United States v. *Angle*,
230 F.3d 113 (4th Cir. 2000) 9

United States v. *Arellano-Rivera*,
244 F.3d 1119 (9th Cir. 2001) 15

United States v. *Arellano-Sandoval*, No. 00-10057,
2001 WL 180839 (9th Cir. Feb. 23, 2001) 17

United States v. *Arevalo-Martinez*, No. 00-4680,
2001 WL 929893 (4th Cir. Aug. 16, 2001) 13

United States v. *Arevalos-Barrios*, No. 00-50311,
2001 WL 180368 (9th Cir. Feb. 23, 2001) 17

United States v. *Arreola-Trasvina*, No. 99-50711,
2001 WL 230531 (9th Cir. Mar. 8, 2001) 17

United States v. *Arriaga-Arroyo*, No. 00-10594,
2001 WL 583139 (9th Cir. May 30, 2001) 16

United States v. *Arroyos-Serna*, No. 01-2010,
2001 WL 939783 (10th Cir. Aug. 17, 2001) 18

United States v. *Artega*, No. 00-1638,
2001 WL 266321 (2d Cir. Mar. 19, 2001) 13

United States v. *Avila*, No. 00-10595,
2001 WL 777441 (9th Cir. July 11, 2001) 15

United States v. *Barajas-Serrato*, No. 00-10408,
2001 WL 584148 (9th Cir. May 30, 2001) 16

United States v. *Barreto-Guzman*, No. 00-10436,
2001 WL 700567 (9th Cir. June 21, 2001) 15

United States v. *Beltran-Angulo*, No. 00-10466,
2001 WL 823732 (9th Cir. July 20, 2001) 15

United States v. *Bishop*, No. 00-10454,
2001 WL 823736 (9th Cir. July 20, 2001) 15

United States v. *Bojorquez-Bracamontes*, No. 00-50766,
2001 WL 868273 (9th Cir. July 31, 2001) 15

United States v. *Bonilla-Guzman*, No. 00-10359,
2001 WL 180568 (9th Cir. Feb. 22, 2001) 17

United States v. *Boustan*, No. 99-10616,
2001 WL 521317 (9th Cir. May 15, 2001) 16

United States v. *Brough*,
243 F.3d 1078 (7th Cir. 2001) 14

United States v. *Buckland*, No. 99-30285,
2001 WL 893440 (9th Cir. Aug. 9, 2001) 15

United States v. *Bustos-Castaneda*, No. 00-4867,
2001 WL 543330 (4th Cir. May 23, 2001) 14

United States v. *Caldwell*, No. 99-6031,
2000 WL 1888682 (6th Cir. Dec. 19, 2000) 14

United States v. *Camacho-Jimenez*, No. 00-4154,
2001 WL 589935 (10th Cir. June 1, 2001) 18

United States v. *Camarillo-Tello*,
236 F.3d 1024 (9th Cir. 2001) 15

United States v. *Camarillo-Vasquez*, No. 00-10293,
2001 WL 584153 (9th Cir. May 30, 2001) 16

United States v. *Caminero*, No. 00-1414,
2001 WL 266310 (2d Cir. Mar. 19, 2001) 13

United States v. *Campos-Chavez*, No. 99-50697,
2001 WL 577013 (9th Cir. May 29, 2001) 16

United States v. *Carrera-Reyes*, No. 00-50336,
2001 WL 66288 (9th Cir. Jan. 25, 2001) 18

United States v. *Castillo-Rivera*,
244 F.3d 1020 (9th Cir. 2001) 15

United States v. *Cervantes-Morales*, No. 00-10536,
2001 WL 583155 (9th Cir. May 30, 2001) 16

United States v. *Cezberg-Loarca*, No. 00-10512,
2001 WL 823731 (9th Cir. July 20, 2001) 15

United States v. *Chaires-Rodarte*, No. 99-50514,
2001 WL 312386 (9th Cir. Mar. 29, 2001) 17

United States v. *Chapa-Garza*,
243 F.3d 921 (5th Cir. 2001) 14

United States v. *Chavaria-Angel*, No. 00-10465,
2001 WL 827831 (9th Cir. July 23, 2001) 15

United States v. *Chavez-Barraza*, No. 00-30015,
2001 WL 68313 (9th Cir. Jan. 24, 2001) 18

United States v. *Chavez*, No. 00-1392,
2001 WL 280201 (10th Cir. Mar. 22, 2001) 19

United States v. *Chavez-Ortega*, No. 00-10365,
2001 WL 408875 (9th Cir. Apr. 19, 2001) 16

United States v. *Cisneros-Valdez*, No. 00-10315,
2001 WL 408884 (9th Cir. Apr. 19, 2001) 16

United States v. *Cruz-Ortiz*, No. 99-50012,
2001 WL 291036 (9th Cir. Mar. 12, 2001) 17

United States v. *Corral-Caraveo*, No. 00-1514,
2001 WL 776933 (10th Cir. July 11, 2001) 18

United States v. *Cortez-Delatorre*, No. 00-2066,
2000 WL 1665078 (8th Cir. Nov. 7, 2000) 14

United States v. *Cruz-Garcia*, No. 00-1775,
2001 WL 498115 (2d Cir. May 10, 2001) 13

United States v. *Cuevas-Andrade*,
232 F.3d 440 (5th Cir. 2000) 14

United States v. *Dabbas*, No. 00-50487,
2001 WL 180468 (9th Cir. Feb. 23, 2001) 17

United States v. *Dabeit*,
231 F.3d 979 (5th Cir. 2000) 14, 19

United States v. *Davis*, No. 00-3624,
2001 WL 914199 (8th Cir. Aug. 15, 2001) 14

United States v. *de la Torre-Chavez*, No. 00-50051,
2001 WL 599619 (9th Cir. June 1, 2001) 15

United States v. *Diaz-Pineda*, No. 00-10357,
2001 WL 921313 (9th Cir. Aug. 14, 2001) 15

United States v. *Doggett*,
230 F.3d 160 (5th Cir. 2000) 9, 14

United States v. *Dorris*,
236 F.3d 582 (10th Cir. 2000) 18

United States v. *Doyon*, Nos. 01-1070 & 01-1177,
2001 WL 649862 (1st Cir. June 4, 2001) 13

United States v. *Dwyer*, No. 99-2483,
2001 WL 845558 (6th Cir. July 16, 2001) 14

United States v. *Encisco-Aceves*, No. 99-50431,
2001 WL 176873 (9th Cir. Feb. 21, 2001) 18

United States v. *Escobar-Perez*, No. 00-10363,
2001 WL 408877 (9th Cir. Apr. 19, 2001) 16

United States v. *Esponda-Ventura*, No. 99-50696,
2000 WL 1861822 (9th Cir. Dec. 18, 2000) 18

United States v. *Fields*,
251 F.3d 1041 (D.C. Cir. 2001) 9

United States v. *Figueroa-Garcia*, No. 00-10568,
2001 WL 583141 (9th Cir. May 30, 2001) 16

United States v. *Flores-Cardona*, No. 00-30407,
2001 WL 823832 (9th Cir. July 20, 2001) 15

United States v. *Floyd*, No. 00-4817,
2001 WL 880118 (4th Cir. Aug. 6, 2001) 13

United States v. *Fresnares-Torres*,
235 F.3d 481 (9th Cir. 2000) 15

United States v. *Fuertes-Ramos*, No. 00-10255,
2001 WL 180564 (9th Cir. Feb. 22, 2001) 17

United States v. *Garcia-Amaro*, No. 00-50304,
2001 WL 231905 (9th Cir. Mar. 8, 2001) 17

United States v. *Garcia-Lonzo*, No. 00-50208,
2001 WL 710645 (9th Cir. June 25, 2001) 15

United States v. *Garcia-Pena*, No. 00-50183,
2001 WL 599465 (9th Cir. June 1, 2001) 16

United States v. *Gatewood*,
230 F.3d 186 (6th Cir. 2000) 14, 19

United States v. *Gaudin*,
515 U.S. 506 (1995) 9

United States v. *Gomez-Pineda*, No. 00-50312,
2001 WL 180432 (9th Cir. Feb. 23, 2001) 17

United States v. *Gomez-Valdovinos*, No. 00-50097,
2000 WL 1868238 (9th Cir. Dec. 20, 2000) 18

United States v. *Grant*, No. 00-1560,
2001 WL 682280 (2d Cir. June 13, 2001) 13

United States v. *Guadamuz-Solis*,
232 F.3d 1363 (11th Cir. 2000) 19

United States v. *Guajardo-Hernandez*, No. 00-3357,
2001 WL 578485 (10th Cir. May 30, 2001) 18

United States v. *Gutierrez-Hernandez*, No. 00-4208,
2001 WL 747802 (10th Cir. July 3, 2001) 18

United States v. *Gutierrez-Herrera*, No. 99-50805,
2001 WL 311323 (9th Cir. Mar. 28, 2001) 17

United States v. *Gutierrez-Lopez*, No. 00-3832,
2001 WL 274093 (8th Cir. Mar. 21, 2001) 14

United States v. *Hayden*,
255 F.3d 768 (9th Cir. 2001) 15

United States v. *Hernandez-Avalos*,
251 F.3d 505 (5th Cir. 2001) 14

United States v. *Hernandez-Bautista*, No. 00-10130,
2001 WL 180562 (9th Cir. Feb. 22, 2001) 18

United States v. *Hernandez-Gutierrez*, No. 00-4642,
2001 WL 378312 (4th Cir. Apr. 16, 2001) 14

United States v. *Hernandez-Rangel*, No. 00-10569,
2001 WL 823725 (9th Cir. July 20, 2001) 15

United States v. *Herrera-Ramirez*, No. 00-50040,
2001 WL 66265 (9th Cir. Jan. 25, 2001) 18

United States v. *Jimenez*, No. 00-10343,
2001 WL 856109 (9th Cir. July 31, 2001) 17

United States v. *Jimenez*, No. 00-50072,
2001 WL 399474 (9th Cir. Apr. 18, 2001) 15

United States v. *Jones*,
245 F.3d 645 (7th Cir. 2001) 14

United States v. *Jorge-Carlos*, No. 00-1684,
2001 WL 514300 (2d Cir. May 15, 2001) 13

United States v. *Juarez-Tafoya*, No. 99-50675,
2001 WL 291044 (9th Cir. Mar. 22, 2001) 17

United States v. *Key*, No. 00-6343,
2001 WL 435248 (10th Cir. Apr. 30, 2001) 18

United States v. *Landeros-Gonzales*, No. 01-10066,
2001 WL 921456 (5th Cir. Aug. 14, 2001) 14

United States v. *LaPorte*, No. 00-1742,
2001 WL 498113 (2d Cir. May 9, 2001) 13

United States v. *Latorre-Benavides*,
241 F.3d 262 (2d Cir. 2001) 13

United States v. *Ledezma-Amezquita*, No. 00-50191,
2000 WL 1875816 (9th Cir. Dec. 26, 2000) 18

United States v. *Lomas-Flores*, No. 00-3760,
2001 WL 548571 (8th Cir. May 24, 2001) 14

United States v. *Lomeli-Diaz*, No. 00-50765,
2001 WL 710648 (9th Cir. June 25, 2001) 15

United States v. *Loya-Chavez*, No. 99-10583,
2001 WL 115009 (9th Cir. Feb. 8, 2001) 18

United States v. *Lozano-Hernandez*, No. 99-50453,
2001 WL 176874 (9th Cir. Feb. 21, 2001) 18

United States v. *Lucena*, No. 00-10490,
2001 WL 583166 (9th Cir. May 30, 2001) 16

United States v. *Macedo-Molina*, No. 00-4925,
2001 WL 822426 (4th Cir. July 20, 2001) 13

United States v. *Mack*,
229 F.3d 226 (3d Cir. 2000) 8

United States v. *Mack*, No. 00-4832,
2001 WL 434850 (4th Cir. Apr. 30, 2001) 14

United States v. *Magallon-Guerrero*, No. 99-50801,
2001 WL 577016 (9th Cir. May 29, 2001) 16

United States v. *Magana-Ojeda*, No. 00-50293,
2001 WL 408775 (9th Cir. Apr. 19, 2001) 17

United States v. *Magana-Urbanes*, No. 00-30144,
2001 WL 66253 (9th Cir. Jan. 25, 2001) 18

United States v. *Martinez-Acosta*, No. 00-10045,
2001 WL 68486 (9th Cir. Jan. 24, 2001) 18

United States v. *Martinez-Ceballoz*, No. 00-10059,
2001 WL 548996 (9th Cir. May 22, 2001) 16

United States v. *Martinez-Cuadros*, No. 00-1454,
2001 WL 290117 (2d Cir. Mar. 23, 2001) 13

United States v. *Martinez-Lomeli*, No. 00-50301,
2001 WL 66283 (9th Cir. Jan. 25, 2001) 18

United States v. *Martinez-Villalva*,
232 F.3d 1329 (10th Cir. 2000) 18

United States v. *Mateo-Mendez*, No. 00-50721,
2001 WL 710647 (9th Cir. June 25, 2001) 15

United States v. *Mattis*, No. 00-50501,
2001 WL 706920 (9th Cir. June 20, 2001) 15

United States v. *Maynie*, Nos. 00-1264, 00-1269, 00-1271,
2001 WL 856142 (8th Cir. July 30, 2001) 14

United States v. *Medina-Arias*, No. 00-50007,
2001 WL 306712 (9th Cir. Mar. 28, 2001) 17

United States v. *Mendias-Chavez*, No. 00-3412,
2001 WL 618170 (10th Cir. June 5, 2001) 18

United States v. *Mendoza-Sandoval*, No. 00-10273,
2001 WL 291146 (9th Cir. Mar. 22, 2001) 17

United States v. *Meza-Casillas*, No. 00-10282,
2001 WL 357522 (9th Cir. Apr. 9, 2001) 17

United States v. *Miranda-Garcia*, No. 00-50081,
2000 WL 1868242 (9th Cir. Dec. 20, 2000) 18

United States v. *Miranda-Gastelum*, No. 00-10009,
2001 WL 180557 (9th Cir. Feb. 22, 2001) 18

United States v. *Morales-Escobedo*, No. 99-50768,
2001 WL 68620 (9th Cir. Jan. 24, 2001) 18

United States v. *Moralez-Pereyra*, No. 00-50206,
2001 WL 827755 (9th Cir. July 23, 2001) 15

United States v. *Moreno*, No. 00-1458,
2001 WL 280252 (10th Cir. Mar. 22, 2001) 19

United States v. *Moreno-Arredondo*,
255 F.3d 198 (5th Cir. 2001) 14

United States v. *Moreno-Galindo*, No. 99-50348,
2001 WL 291039 (9th Cir. Mar. 22, 2001) 17

United States v. *Moya-Avila*, No. 00-50185,
2001 WL 827822 (9th Cir. July 23, 2001) 15

United States v. *Munoz-Hernandez*, No. 00-50119,
2001 WL 306713 (9th Cir. Mar. 28, 2001) 17

United States v. *Murillo-Contreras*, No. 99-50737,
2001 WL 408894 (9th Cir. Apr. 19, 2001) 16

United States v. *Napoles-Garcia*, No. 01-1296,
2001 WL 641564 (8th Cir. June 12, 2001) 14

United States v. *Narvaez*, No. 00-50394,
2001 WL 180436 (9th Cir. Feb. 23, 2001) 17

United States v. *Nava-Perez*,
242 F.3d 277 (5th Cir. 2001) 14

United States v. *Navarro-Torrez*, No. 00-10044,
2001 WL 827603 (9th Cir. July 23, 2001) 15

United States v. *Nelson*, No. 00-3858,
2001 WL 548577 (8th Cir. May 24, 2001) 14

United States v. *Neuhausser*,
241 F.3d 460 (6th Cir. 2001) 14

United States v. *Nordby*,
225 F.3d 1053 (9th Cir. 2000) 9

United States v. *Nunes*, No. 01-1120,
2001 WL 505971 (7th Cir. May 11, 2001) 14

United States v. *Obregon-Segura*, No. 00-50430,
2001 WL 306719 (9th Cir. Mar. 28, 2001) 17

United States v. *Olvera-Yanez*, No. 00-3852,
2001 WL 214102 (8th Cir. Mar. 6, 2001) 14

United States v. *Orantes-Mendez*, No. 00-3358,
2001 WL 617930 (10th Cir. June 5, 2001) 18

United States v. *Orozco-Rangel*, No. 99-50800,
2000 WL 1868227 (9th Cir. Dec. 20, 2000) 18

United States v. *Ortega-Ramirez*, No. 00-50396,
2001 WL 827660 (9th Cir. July 23, 2001) 18

United States v. *Ortega-Ramirez*, No. 99-50226,
2001 WL 174614 (9th Cir. Feb. 21, 2001) 15

United States v. *Pacheco-Adame*, No. 00-10531,
2001 WL 583163 (9th Cir. May 30, 2001) 16

United States v. *Pacheco-Ramos*, No. 00-50201,
2001 WL 599302 (9th Cir. June 1, 2001) 16

United States v. *Pacheco-Zepeda*,
234 F.3d 411 (9th Cir. 2000) 15, 19

United States v. *Padilla-Reyes*,
247 F.3d 1158 (11th Cir. 2001) 19

United States v. *Page*,
232 F.3d 536 (6th Cir. 2000) 9

United States v. *Palacios-Lizarraga*, No. 00-50209,
2001 WL 408785 (9th Cir. Apr. 19, 2001) 16

United States v. *Palomares-Munoz*, No. 00-50216,
2001 WL 219951 (9th Cir. Mar. 5, 2001) 17

United States v. *Palomino-Rivera*, No. 00-3640,
2001 WL 818791 (7th Cir. July 20, 2001) 14

United States v. *Paredes-Hernandez*, No. 00-10389,
2001 WL 180569 (9th Cir. Feb. 22, 2001) 17

United States v. *Patino-Salazar*, No. 99-50082,
2001 WL 51514 (9th Cir. Jan. 22, 2001) 18

United States v. *Peralta-Moran*, No. 00-30031,
2001 WL 399471 (9th Cir. Apr. 18, 2001) 17

United States v. *Perez*, No. 00-10268,
2001 WL 537770 (9th Cir. May 18, 2001) 16

United States v. *Perez*, No. 00-1692,
2001 WL 300530 (2d Cir. Mar. 28, 2001) 13

United States v. *Perez-Espino*, No. 00-50019,
2001 WL 206005 (9th Cir. Feb. 28, 2001) 17

United States v. *Perez-Rios*, No. 99-50674,
2001 WL 820914 (9th Cir. July 19, 2001) 15

United States v. *Phipps*, No. 01-1289WM,
2001 WL 893837 (8th Cir. Aug. 9, 2001) 14

United States v. *Porras-Rodriguez*, No. 00-50277,
2001 WL 408782 (9th Cir. Apr. 19, 2001) 16

United States v. *Prieto-Molinar*, No. 00-50546,
2001 WL 577024 (9th Cir. May 29, 2001) 16

United States v. *Pulido-Noriega*, No. 00-10453,
2001 WL 408796 (9th Cir. Apr. 19, 2001) 16

United States v. *Quinones-Garcia*, No. 99-50110,
2001 WL 291038 (9th Cir. Mar. 22, 2001) 17

United States v. *Quintana-Torres*,
235 F.3d 1197 (9th Cir. 2000) 15

United States v. *Ramirez-Garcia*, No. 00-10346,
2001 WL 868440 (9th Cir. Aug. 1, 2001) 15

United States v. *Ramirez-Gil*, No. 00-3532,
2001 WL 306091 (8th Cir. Mar. 30, 2001) 14

United States v. *Ramirez-Meija*, No. 00-50248,
2001 WL 231459 (9th Cir. Mar. 8, 2001) 17

United States v. *Ramirez-Vargas*, No. 00-10335,
2001 WL 180567 (9th Cir. Feb. 22, 2001) 17

United States v. *Raya-Ramirez*,
244 F.3d 976 (8th Cir. 2001) 14

United States v. *Renteria-Almodovar*, No. 00-10229,
2001 WL 294316 (9th Cir. Mar. 26, 2001) 17

United States v. *Reyes-Pacheco*,
248 F.3d 942 (9th Cir. 2001) 15

United States v. *Reyes-Salgado*, No. 00-10331,
2001 WL 804119 (9th Cir. July 17, 2001) 15

United States v. *Reynaga-Fregozo*, No. 99-50682,
2001 WL 569139 (9th Cir. May 25, 2001) 16

United States v. *Rivas-Ayala*, No. 00-50260,
2001 WL 408783 (9th Cir. Apr. 19, 2001) 16

United States v. *Rivera-Alonzo*, No. 00-10418,
2001 WL 841069 (9th Cir. July 25, 2001) 15

United States v. *Rivera-Alvarez*, No. 01-1083,
2001 WL 845294 (10th Cir. July 26, 2001) 18

United States v. *Robles-Frias*, No. 00-10294,
2001 WL 180565 (9th Cir. Feb. 22, 2001) 17

United States v. *Robles-Macias*, No. 00-50001,
2001 WL 180414 (9th Cir. Feb. 23, 2001) 17

United States v. *Rodriguez-Cosio*, No. 99-50679,
2001 WL 569141 (9th Cir. May 25, 2001) 16

United States v. *Rodriguez-Hernandez*, No. 00-1418,
2001 WL 491130 (10th Cir. May 9, 2001) 18

United States v. *Rodriguez-Jimenez*, No. 00-50124,
2001 WL 599618 (9th Cir. June 1, 2001) 15

United States v. *Rodriguez-Llamas*, No. 99-50347,
2001 WL 408898 (9th Cir. Apr. 19, 2001) 16

United States v. *Rodriguez-Osorio*, No. 00-10478,
2001 WL 700569 (9th Cir. June 21, 2001) 15

United States v. *Rogers*,
228 F.3d 1318 (11th Cir. 2000) 9

United States v. *Roldan-Palacios*, No. 00-10438,
2001 WL 180506 (9th Cir. Feb. 22, 2001) 18

United States v. *Romero*, No. 00-2478,
2001 WL 427957 (10th Cir. Apr. 26, 2001) 19

United States v. *Romero-Cortez*, No. 00-30279,
2001 WL 700767 (9th Cir. June 21, 2001) 15

United States v. *Rush*,
240 F.3d 729 (8th Cir. 2001) 14

United States v. *Saavedra-Martinez*, No. 99-50124,
2001 WL 408921 (9th Cir. Apr. 19, 2001) 16

United States v. *Salas-Rivera*, No. 00-50683,
2001 WL 936620 (9th Cir. Aug. 17, 2001) 15

United States v. *Salazar*, No. 00-1398,
2001 WL 280219 (10th Cir. Mar. 22, 2001) 19

United States v. *Salgado-Castillo*, No. 00-50254,
2001 WL 710646 (9th Cir. June 25, 2001) 15

United States v. *Sallas-Moreno*, No. 00-4199,
2001 WL 744972 (10th Cir. July 3, 2001) 18

United States v. *Sanchez-Rodriguez*, No. 00-50398,
2001 WL 408773 (9th Cir. Apr. 19, 2001) 17

United States v. *Sanchez-Sanchez*, No. 00-30266,
2001 WL 180541 (9th Cir. Feb. 22, 2001) 18

United States v. *Sandoval-Rocca*, No. 00-4474,
2000 WL 1836771 (4th Cir. Dec. 14, 2000) 14

United States v. *Santibanez-Ramirez*, No. 00-10555,
2001 WL 583143 (9th Cir. May 30, 2001) 16

United States v. *Santos-Rios*, No. 00-10545,
2001 WL 700573 (9th Cir. June 21, 2001) 15

United States v. *Shakellwood*, No. 00-1701,
2001 WL 682285 (2d Cir. June 13, 2001) 13

United States v. *Skidmore*,
254 F.3d 635 (7th Cir. 2001) 14

United States v. *Suarez-Morales*, No. 00-1427,
2001 WL 280247 (10th Cir. Mar. 22, 2001) 19

United States v. *Tafoya-Gonzales*, No. 00-50374,
2001 WL 599245 (9th Cir. June 1, 2001) 16

United States v. *Tapia*, No. 00-6408,
2001 WL 799198 (10th Cir. July 16, 2001) 18

United States v. *Terry*,
240 F.3d 65 (1st Cir. 2001) 13, 19

United States v. *Thomas*,
248 F.3d 76 (2d Cir. 2001) 9

United States v. *Thomas*,
242 F.3d 1028 (11th Cir. 2001) 19

United States v. *Valdez-Romero*, No. 00-10475,
2001 WL 488902 (9th Cir. May 8, 2001) 16

United States v. *Valdovino-Torres*, No. 99-50599,
2000 WL 1256891 (9th Cir. Sept. 5, 2000) 18

United States v. *Valencia-Gonzalez*, No. 99-50010,
2001 WL 408942 (9th Cir. Apr. 19, 2001) 16

United States v. *Vasquez*, No. 00-1719,
2001 WL 792351 (2d Cir. July 6, 2001) 13

United States v. *Vergel-Garcia*, No. 00-50026,
2001 WL 408788 (9th Cir. Apr. 19, 2001) 16

United States v. *Vicioso-Ayra*, No. 01-1051,
2001 WL 699528 (2d Cir. June 19, 2001) 13

United States v. *Villa-Lozano*, No. 00-10429,
2001 WL 584147 (9th Cir. May 30, 2001) 16

United States v. *Villegas-Lara*, No. 00-10413,
2001 WL 408800 (9th Cir. Apr. 19, 2001) 16

United States v. *Webb*,
255 F.3d 890 (D.C. Cir. 2001) 13

United States v. *Westmoreland*,
240 F.3d 618 (7th Cir. 2001) 9

United States v. *Whitt*, No. 99-2017,
2001 WL 114734 (7th Cir. Feb. 7, 2001) 14

United States v. *Wilson*,
244 F.3d 1208 (10th Cir. 2001) 18

United States v. *Yanez-Dominguez*, No. 00-2272,
2001 WL 575461 (8th Cir. May 30, 2001) 14

United States v. *Yedra*, No. 00-30151,
2001 WL 219913 (9th Cir. Mar. 5, 2001) 17

United States v. *Zambrano-Ayala*, No. 99-30300,
2001 WL 68638 (9th Cir. Jan. 24, 2001) 18

United States v. *Zamora-Rivera*, No. 99-50240,
2001 WL 408907 (9th Cir. Apr. 19, 2001) 16

United States v. *Zamudio-Orozco*, No. 00-30195,
2001 WL 357512 (9th Cir. Apr. 10, 2001) 17

United States v. *Zedillo-Camarillo*, No. 00-10381,
2001 WL 584149 (9th Cir. May 30, 2001) 16

United States v. *Zepeda-Olivas*, No. 00-4363,
2001 WL 409502 (4th Cir. Apr. 23, 2001) 14

Winship, In re,
397 U.S. 358 (1970) 9

Constitutional Provisions

U.S. Const. amend. VI 9

Statutes

21 U.S.C. § 841 ..... 2, 3
21 U.S.C. § 841(a)(1) 5
21 U.S.C. § 841(b) 5
21 U.S.C. § 841(b)(1) 5, 6
21 U.S.C. § 841(b)(1)(A) 7
21 U.S.C. § 841(b)(1)(A)(ii) 3, 7
21 U.S.C. § 841(b)(1)(A)(iii) 3, 7
21 U.S.C. § 841(b)(1)(B) 7
21 U.S.C. § 841(b)(1)(B)(ii) 7

21 U.S.C. § 841(b)(1)(B)(iii) 6
21 U.S.C. § 841(b)(1)(C) 4, 5, 6, 7, 20
21 U.S.C. § 846 ..... 2, 3
21 U.S.C. § 841 2
28 U.S.C. § 1254(1) 1

Articles

Glenda Cooper, *Drug Cases, Sentences Up Sharply Since 1984*, WASH. POST, Aug. 20, 2001, at A2 10

John K. Zwerling, *Comprendez* Apprendi?, 38 AM. CRIM. L. REV. 309 (2001) 8

Other Authorities

U.S.S.G. § 2D1.1(a)(3) 3
U.S.S.G. § 2D1.1(c)(3) 3
U.S.S.G. § 3B1.1(c) 3
U.S.S.G. ch. 5, pt. A 4

In the Supreme Court of the United States

OCTOBER TERM, 2000

No. _____

DERRICK MICHAEL MCCAIN,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Michael McCain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The April 9, 2001 decision of the court of appeals, affirming Mr. McCain's conviction and sentence on direct review (App. 1a–5a), is unreported. The court's order of May 29, 2001, denying Mr. McCain's petition for rehearing or reconsideration *en banc* (App. 6a) is unreported.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Third Circuit rendered the decision sought to be reviewed on April 9, 2001. That court denied a timely filed petition for reconsideration or rehearing *en banc* on May 29, 2001. This Court has jurisdiction to review the Third Circuit's decision on certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE

The statutory and constitutional provisions at issue here are reproduced in the Appendix pursuant to S. Ct. R. 14.1(f). (App. 7a–18a). The relevant statutes are 21 U.S.C. §§ 841 & 846, which define certain drug trafficking crimes and the penalties applicable thereto. The relevant constitutional provisions are the Fifth and Sixth Amendments.

STATEMENT OF THE CASE

1. In a twenty-count Superseding Indictment returned in July 1995, a federal grand jury in the Western District of Pennsylvania accused eight persons of committing various crimes during a five-year narcotics trafficking conspiracy. Petitioner Derrick Michael McCain was named only in Count One of this Indictment, which accused him of conspiring with the other defendants to possess cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. § 846. The Superseding Indictment specified the controlled substances at issue (cocaine and cocaine base), but did not attribute any specific quantity or quantities of those substances to Petitioner.[1] The indictment also did not charge that Petitioner had a prior felony conviction.

2. The government filed a pretrial Information pursuant to 21 U.S.C. § 851, stating that Petitioner had previously been convicted in Pennsylvania state court of delivery of cocaine, a felony.[2]

3. The case was tried to a jury and the Honorable Robert J. Cindrich, U.S.D.J. On April 19, 1996, the jury returned a guilty verdict as to Count One against Petitioner.[3] The jury was not instructed to, and did not, make any findings of fact

1. The Superseding Indictment was reproduced in the parties' Joint Appendix in the Court of Appeals (hereafter, "CA JA") at 109a. The trial court denied a pretrial motion by Petitioner for a bill of particulars requiring the government to specify "[t]he exact amount(s) of cocaine, and/or cocaine base involved in said 'conspiracy'." CA JA 163a.

2. CA JA 182a.

3. CA JA 173a.

with respect to (1) whether Petitioner had a prior felony conviction, or (2) what quantity of controlled substances involved in Count One were attributable to Petitioner.

4. Persons convicted of conspiracy, in violation of 21 U.S.C. § 846, are "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy."[4] The statute defining the underlying offense here was 21 U.S.C. § 841, which specifically defines differing statutory maximum penalties depending on the quantity of controlled substances at issue in any particular violation, as discussed in more detail *infra*. Accordingly, the sentencing court proceeded to calculate Petitioner's sentence under Section 841.

At sentencing, Petitioner and the government disputed the quantity of controlled substances attributable to Petitioner. On August 22, 1996, the district court, "[a]fter having heard the arguments of counsel *and based on a preponderance of the evidence*, * * * f[ound that] the quantity attributable to [Petitioner was] 8.8 kilo[gram]s of cocaine and 350 grams of [cocaine base]."[5] The applicable statute authorizes a term of imprisonment of 10 years to life for offenses involving those drug quantities.[6]

5. Based on its quantity determination, and its finding that Petitioner had "helped supervise the distribution of cocaine and crack,"[7] the district court assigned Petitioner a base offense level of 36 for sentencing purposes.[8] Based on its finding of Petitioner's prior conviction (which had not been charged in the indictment, submitted to the jury, or proved beyond a reasonable doubt) and the Presentence Investigation Report, the district court assigned Petitioner a criminal history category of

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4. 21 U.S.C. § 846.

5. CA JA 11a, 275a (emphasis added).

6. See 21 U.S.C. § 841(b)(1)(A)(ii), (iii) (authorizing "a term of imprisonment which may not be less than 10 years or more than life" for any defendant whose "violation of subsection (a) of this section involv[ed] * * * 5 kilograms or more of a mixture or substance containing a detectable about of * * * cocaine * * * [or] 50 grams or more of a mixture or substance * * * which contains cocaine base"). The court stated on the record that it was sentencing Petitioner "under Section 841(b)(1)(A)[.]" CA JA 258a.

7. CA JA 12a, 276a.

8. See U.S.S.G. §§ 2D1.1(a)(3), (c)(3), 3B1.1(c).

V, which, together with the base offense level of 36, yielded a guideline sentencing range of 292–365 months.[9]

6. The district court sentenced Petitioner to 300 months' imprisonment; a 10-year period of supervised release; and a $50 assessment. The court declined to assess any fine or restitution.[10]

7. On appeal, the court of appeals rejected Petitioner's contention that the sentence imposed on him violated this Court's rulings in *Jones* v. *United States*[11] and *Apprendi* v. *New Jersey*.[12] Petitioner argued that the district court's failure to submit the issues of narcotics quantity to the jury, and to require the quantity to be proved beyond a reasonable doubt, contravened the constitutional principle that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[13] Petitioner argued that the statute at issue expressly provided for progressively longer maximum sentences upon a finding that the quantity of narcotics at issue in a given case exceeded statutorily specified minimum thresholds. Petitioner further argued that, for that reason, quantity was a "fact that increases the penalty for a crime" beyond the maximum that would have governed in the absence of the quantity determination. Petitioner argued that the statutory maximum penalty for the offense, but for the quantity finding, was a 20-year term of imprisonment.[14]

The court of appeals acknowledged that "there would be an *Apprendi* issue" if Petitioner had "been sentenced to a term of imprisonment greater than 20 years based solely upon the District Court's determination of quantity[.]" (App. 4a). The court of appeals disagreed with Petitioner, however, that the applicable statutory maximum prison term was 20 years. Instead, it ruled that Petitioner "was subject to a maximum 30-

9. See U.S.S.G. ch. 5, pt. A.

10. CA JA 6a–8a, 270a–272a.

11. 526 U.S. 227 (1999).

12. 530 U.S. 466 (2000).

13. *Apprendi*, 530 U.S. at 490; see also *Jones*, 526 U.S. at 243 n.6.

14. See 21 U.S.C. § 841(b)(1)(C) ("except as provided in [the other subparagraphs of Section 841(b)(1)], such person shall be sentenced to a term of imprisonment of not more than 20 years").

year term of imprisonment pursuant to section 841(b)(1)(C), regardless of the quantity of drugs underlying his federal conspiracy conviction" because of the sentencing judge's finding that Petitioner had a prior felony conviction. (App. 4a).[15] Because it believed the applicable statutory maximum prison sentence to be 30 years, the court of appeals concluded that Petitioner's 25-year "sentence was not 'more severe than the statutory maximum for the offense established by the jury's verdict.'" (App. 4a) (quoting *Apprendi*). Accordingly, the court of appeals affirmed Petitioner's conviction and sentence.

REASONS FOR GRANTING THE WRIT

I.

THE CONSTITUTION REQUIRES THE TYPES AND QUANTITIES SPECIFIED IN SUBPARAGRAPHS 841(B)(1)(A) AND (B) TO BE TREATED AS ELEMENTS OF THE OFFENSE DEFINED IN SUBSECTION 841(A)

A. The Facts Of Prior Conviction And Narcotics Type And Quantity, Where Proved, Expose A Defendant To Greater Maximum Punishment

The statutory scheme under which Petitioner was sentenced makes the maximum permissible sentence dependent, inter alia, upon (1) the type and quantity of controlled substances involved in any violation, and (2) whether a person convicted of any violation has a "prior conviction for a felony drug offense." A consideration of the statutory scheme will show that these facts—type, quantity, and prior conviction—are, and must be, treated as elements of the offense under the reasoning of *Jones* and *Apprendi*.

The statute defining the substantive offense at issue here, 21 U.S.C. § 841(a)(1), makes it a crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." A person convicted of violating, or conspiring to violate, this provision

15. 21 U.S.C. § 841(b)(1)(C) provides in part that, "[i]f any person commits such a violation [of Section 841(a)] after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years[.]"

is subject to sentence under Subsection 841(b). Paragraph 841(b)(1) contains several subparagraphs that define escalating penalty ranges based on the type and quantity of controlled substances at issue in any violation of Subsection 841(a). Additionally, some parts of Paragraph 841(b)(1) expose a defendant to higher maximum penalties upon a showing that the defendant has a prior felony conviction.

Where the quantity of controlled substances at issue falls below the thresholds established in the other subparagraphs of Paragraph 841(b)(1), or where no quantity is specified, the "catch-all" provision of Subparagraph 841(b)(1)(C), which (with immaterial exceptions) contains no reference to drug type or quantity, establishes the maximum penalty for any violation.[16] That provision states that, "except as provided in subparagraphs (A), (B), and (D)," a person who violates Subsection 841(a) "shall be sentenced to a term of imprisonment of not more than 20 years[.]" If it shown, however, that a defendant violated Subsection 841(a) "after a prior conviction for a felony drug offense has become final," the statute permits the defendant to be sentenced to "a term of imprisonment of not more than 30 years[.]" Thus, the fact of "prior conviction for a felony drug offense," where shown, increases the statutory maximum penalty under Paragraph 841(b)(1) from "20 years" to "30 years[.]"[17]

Subparagraphs (A) and (B) of Paragraph 841(b)(1) specify differing ranges of penalties—greater in each instance than the twenty-year maximum of Subparagraph 841(b)(1)(C)'s "catch-all" provision—for defendants who are convicted of trafficking in a specified minimum quantity of controlled substances. Subparagraph 841(b)(1)(B) provides for "a term of imprisonment

16. See *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 930 (8th Cir. 2000) ("[s]ection 841(b)(1)(C) defines penalties * * * without reference to drug quantity.").

17. Although not directly in issue here, Subparagraph 841(b)(1)(C) also contains other provisions, in addition to the prior felony conviction provision, that define maximum sentences greater than the 20-year default maximum that would otherwise apply. If it is shown that "death or serious bodily injury" resulted from the use of the controlled substance, the sentence "shall be * * * not less than twenty years or more than life[.]" Where "death or serious bodily injury" results *and* defendant has a prior felony conviction, the statute mandates a life sentence.

which may not be less than 5 years and not more than 40 years" for defendants whose violation involved at least 5 grams of cocaine base or at least 500 grams of cocaine.[18] Subparagraph 841(b)(1)(A) imposes still greater maximum punishments for more serious offenses: a violation involving at least 50 grams of cocaine base or 5 kilograms of cocaine carries with it a sentence of ten years to life imprisonment.[19]

Subparagraphs (A) and (B) establish still greater penalties where, in addition to the specified types and quantities of narcotics, it is further proved that the defendant has a prior felony drug conviction. If it is shown that a defendant has a prior felony drug conviction and that the defendant's violation of Subsection 841(a) involved at least 5 grams of cocaine base or 500 grams of cocaine, Subparagraph 841(b)(1)(B) authorizes a prison sentence of ten years to life. If a recidivist's offense involved at least 50 grams of cocaine base or 5 kilograms of cocaine, Subparagraph 841(b)(1)(A) authorizes a prison sentence of twenty years to life.

In sum, the statutory scheme at issue here—the basis for thousands of federal drug prosecutions annually—exposes defendants to one basic statutory maximum penalty upon proof of any violation, then increases that maximum penalty if additional facts are shown. Proof that a defendant has a prior felony drug conviction increases the statutory maximum penalty from 20 to 30 years under Subparagraph 841(b)(1)(C) and from 40 years to life imprisonment under Subparagraph 841(b)(1)(B). Proof that the specified types and minimum quantities of narcotics were involved in a particular case will increase the maximum sentence to which the defendant may be exposed from 20 years to 40 years or to life imprisonment. Where both the specified quantities and a prior conviction are proved, the maximum sentences are still greater. Table 1 below summarizes the effect of the type, quantity, and prior conviction provisions on the statutory maximum sentence.

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18. See 21 U.S.C. § 841(b)(1)(B)(ii), (iii). We use the examples of cocaine and cocaine base as illustrative here because those were the particular substances charged in Petitioner's indictment. The same analysis would apply, of course, for any of the many other narcotics types and quantities listed in the statute.

19. See 21 U.S.C. § 841(b)(1)(A)(ii), (iii).

Table 1.
Statutory Maximum Sentences Under 21 U.S.C. § 841(b)(1)

Quantities Proved	**Without Prior Conviction**	**With Prior Conviction**
None specified, *or* below minimum thresholds of 21 U.S.C. § 841(b)(1)(B)	20 years	30 years
Cocaine Base, ≥ 5 g, *or* Cocaine, ≥ 500 g	40 years	life
Cocaine Base, ≥ 50 g, *or* Cocaine, ≥ 5 kg	life	life

B. Because The Facts Of Narcotics Type And Quantity Alter The Statutory Maximum Sentence, Those Facts Must Be Considered Elements Of The Offense

The preceding section's assessment of the statutory structure of 21 U.S.C. § 841 showed that the narcotics type and quantity provisions of Subparagraphs 841(b)(1)(A) and (B) have the effect of increasing the maximum punishment to which a defendant is exposed. For that reason, the constitutional principles of *Jones* and *Apprendi* carry significant consequences for the statutory sentencing scheme that governs most federal drug prosecutions.[20] Because a finding of narcotics type and quantity "expose[s] a defendant to a punishment greater than that otherwise legally prescribed," those facts must be considered to be "by definition 'elements' of a separate legal offense."[21] They should, accordingly, be subject to the same

20. See *United States* v. *Mack*, 229 F.3d 226, 236 n.1 (3d Cir. 2000) (Becker, C.J., concurring) ("*Apprendi* most obviously implicates federal drug sentences because in such cases it is common for the judge, rather than the jury, to determine (and sentence based on) the quantity of drugs possessed."). Beginning with *Jones* v. *United States*, 530 U.S. 1271 (2000), vacating and remanding 194 F.3d 1178 (10th Cir. 1999), this Court remanded scores of cases involving drug sentencing under 21 U.S.C. § 841 for further consideration in light of *Apprendi*. See John K. Zwerling, *Comprendez* Apprendi?, 38 AM. CRIM. L. REV. 309, 313 (2001) ("[t]he application of *Apprendi* to drug cases is creating quite a stir in the stir.").

21. *Apprendi*, 530 U.S. at 483 n.10; see also *id.* at 495 ("[w]hen a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a

constitutional strictures applicable to all other elements of a criminal offense: indictment,[22] trial by jury,[23] and proof beyond a reasonable doubt.[24]

The courts of appeals, owing to the great volume of federal drug prosecutions, have of necessity applied the reasoning of *Jones* and *Apprendi* in many cases arising under 21 U.S.C. § 841. Many of the lower courts have concluded that, in the wake of *Apprendi*, it is plain error not to submit the question of narcotics type and quantity to the jury, and that in the absence of a jury finding on the issue, the court may not impose any sentence greater than the twenty-year base maximum of Subparagraph 841(b)(1)(C).[25] Litigation over *Apprendi* issues in federal drug prosecutions continues, however, to consume substantial attention in the lower courts.[26]

In view of the substantial amount of *Apprendi*-related liti-

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tail which wags the dog of the substantive offense.'") (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986)).

22. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 217 (1960) ("a court cannot permit a defendant to be tried on charges that are not made in the indictment against him") (citing *Ex parte Bain*, 121 U.S. 1, 13 (1887)). *Apprendi* did not address this issue because it was not raised by the petitioner in that case and because a state, rather than federal, statute was involved—which obviously is not true of 21 U.S.C. § 841. See *Apprendi*, 530 U.S. at 477 n.3.

23. U.S. Const. amend. VI; *United States* v. *Gaudin*, 515 U.S. 506 (1995); *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968) ("trial by jury in criminal cases is fundamental to the American scheme of justice").

24. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

25. See *United States* v. *Fields*, 251 F.3d 1041, 1043 (D.C. Cir. 2001); *United States* v. *Angle*, 230 F.3d 113, 123–124 (4th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 164–165 (5th Cir. 2000); *United States* v. *Page*, 232 F.3d 536, 543 (6th Cir. 2000); *United States* v. *Westmoreland*, 240 F.3d 618, 632 (7th Cir. 2001); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States* v. *Nordby*, 225 F.3d 1053, 1058–1059 (9th Cir. 2000); *United States* v. *Rogers*, 228 F.3d 1318, 1327–1328 (11th Cir. 2000).

26. See, *e.g.*, *United States* v. *Thomas*, 248 F.3d 76, 78 (2d Cir. 2001) (granting motion for *en banc* rehearing and directing parties to brief the following question: "[d]oes drug quantity under 21 U.S.C. § 841, when it increases a defendant's sentence above a statutory maximum, constitute an element of the offense under the analysis used in *Apprendi*" and other cases).

gation that has consumed, and continues to consume, the time and attention of the lower courts, and particularly in light of the large number of federal drug prosecutions that rest upon 21 U.S.C. §§ 841 and 846,[27] the question whether the narcotics types and quantities listed in the statute are elements of the Section 841 offense plainly qualifies as "an important question of federal law that has not been, but should be, settled by this Court[.]"[28] The writ should issue to address the application of *Jones* and *Apprendi* in the context of federal narcotics prosecutions under 21 U.S.C. §§ 841 and 846.

II.

THE CONSTITUTION REQUIRES THE FACT OF PRIOR FELONY CONVICTION TO BE TREATED AS AN ELEMENT OF THE OFFENSE DEFINED IN SUBPARAGRAPH 841(B)(1)(C)

In *Almendarez-Torres* v. *United States*,[29] this Court held, by a vote of 5 to 4, that Congress could, consistent with the Constitution, increase a defendant's maximum sentence from two to twenty years' imprisonment upon a finding by the sentencing judge, by a preponderance of the evidence, that the defendant had a "conviction for commission of an aggravated felony."[30] The Court rejected the petitioner's contention that the prior conviction provision specified an element of the offense that had to be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. The Court found the legislature's intention to create a sentencing factor, rather than an element of the offense, to be clear from the face of the statute, and found no constitutional impediment to applying the statute as written.[31]

This Court's decision in *Apprendi*, however, showed that there was substantial historical support for treating "any fact

27. Drug cases now account for some one-third of federal criminal prosecutions, with most defendants being charged with trafficking rather than simple possession. See Glenda Cooper, *Drug Cases, Sentences Up Sharply Since 1984*, WASH. POST, Aug. 20, 2001, at A2.

28. S. Ct. R. 10(c).

29. 523 U.S. 224 (1998).

30. *Id.* at 226 (quoting 8 U.S.C. § 1326(b)(2)).

31. See *id.* at 231–234, 241–246.

that increases the penalty for a crime beyond the prescribed statutory maximum"[32] that would otherwise apply, as an element of the offense. This conclusion, and the historical rationale on which it rested, stands in great tension with the principle of *Almendarez-Torres* that not all such facts need be considered elements of the offense. Apparently to preserve the narrow holding of *Almendarez-Torres*, this Court qualified its holding in *Apprendi* by saying that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[33] The phrase "[o]ther than the fact of prior conviction" reflected the fact that, in *Apprendi*, the petitioner "d[id] not contest the [*Almendarez-Torres*] decision's validity" and it was unnecessary for the Court to address a question not presented.[34] Yet *Apprendi* candidly acknowledged the inconsistency between its reasoning and the result in *Almendarez-Torres*, labeling *Almendarez-Torres* "at best an exceptional departure from the historic practice that we have described"[35] and acknowledging that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested[.]"[36]

The tension between *Almendarez-Torres* on the one hand, and *Jones* and *Apprendi* on the other, has its roots in the latter two decisions' historically based analyses. Both *Jones* and *Apprendi* drew heavily upon historical reasoning in reaching their respective conclusions. *Jones* surveyed a considerable volume of historical literature dealing with the roles of the judge and jury in matters of sentencing in England and in the United States at the time of the Revolution.[37] Partly because the historical record pointed away from "an accepted tolerance for exclusively judicial factfinding to peg penalty limits,"[38] the Court rejected the interpretation of the statute advanced by

32. *Apprendi*, 530 U.S. at 490.
33. *Ibid.* (emphasis added).
34. See *ibid.*
35. *Id.* at 487.
36. *Id.* at 489–490 (footnote omitted).
37. See *Jones*, 526 U.S. at 244–248.
38. *Id.* at 244.

the government in that case.

Apprendi, too, drew heavily upon the historical record. In discussing the historical understanding of the Sixth Amendment's jury trial guarantee, the Court observed that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."[39] Instead, the Court found, the historic practice was for the indictment to contain "'all the facts and circumstances which constitute the offence * * * [in order] *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted.'"[40] Trial judges in this system enjoyed "'very little explicit discretion in sentencing[,]'" but rather were intended to impose the "'particular sentence for each offense'" that the law prescribed.[41] And "[j]ust as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment."[42] This historical understanding of the judge's role in sentencing "highlight[ed] the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive [absent the finding]."[43] Instead, because "[t]he judge's role in sentencing is constrained * * * by the facts alleged in the indictment and found by the jury[,]" "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."[44] Justice Thomas's concurring opinion in *Apprendi* suggested that *Almendarez-Torres* could not be squared with this historical analysis.[45]

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39. *Apprendi*, 530 U.S. at 478 (footnote omitted).

40. *Ibid.* (citation omitted).

41. *Id.* at 479 (citation omitted).

42. *Id.* at 480.

43. *Id.* at 482–483.

44. *Id.* at 483 n.10.

45. See *id.* at 506–508, 514–518 (Thomas, J., concurring); see also *id.* at 506–507 (Thomas, J., concurring) (noting a "tradition stretch[ing] back to the earliest years of the Republic" "of treating recidivism as an element") (citing *Almendarez-Torres*, 523 U.S. at 256–257, 261 (Scalia, J., dissent-

The *Apprendi* majority's language calling the future viability of *Almendarez-Torres* into doubt, together with its adoption of a historically based method of analysis that appeared incompatible with *Almendarez-Torres*'s result, has sparked substantial litigation over the continuing vitality of the *Almendarez-Torres* principle. Cases have arisen in every Circuit raising the question whether the fact of prior conviction, where it increases the maximum possible sentence to which a defendant is exposed, must be treated as an element of the offense. The volume of cases collected in the margin shows that this has been an issue all the courts of appeals have had to address repeatedly since *Apprendi*,[46] and there is every reason to expect this

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ing)); *id.* at 507 (Thomas, J., concurring) (in historical practice, "the fact of a prior conviction was an element, together with the facts constituting the core crime of which the defendant was charged, of a new, aggravated crime").

46. The following cases, listed by Circuit of origin, have considered the question whether recidivism remains a valid "sentencing factor" (the *Almendarez-Torres* rule) in the wake of *Apprendi*. The listing below includes decisions designated by the issuing court as not for publication, but are included merely to illustrate the volume of litigation over the issue that has taken place, and is currently taking place, in all the federal courts.

District of Columbia Circuit. *United States* v. *Webb*, 255 F.3d 890, 897–898 (D.C. Cir. 2001).

First Circuit. *United States* v. *Terry*, 240 F.3d 65, 73–74 (1st Cir. 2001); see also *United States* v. *Doyon*, Nos. 01-1070 & 01-1177, 2001 WL 649862 (1st Cir. June 4, 2001).

Second Circuit. *United States* v. *Latorre-Benavides*, 241 F.3d 262, 263–264 (2d Cir. 2001); see also *United States* v. *Vasquez*, No. 00-1719, 2001 WL 792351 (2d Cir. July 6, 2001); *United States* v. *Vicioso-Ayra*, No. 01-1051, 2001 WL 699528 (2d Cir. June 19, 2001); *United States* v. *Shakellwood*, No. 00-1701, 2001 WL 682285 (2d Cir. June 13, 2001); *United States* v. *Grant*, No. 00-1560, 2001 WL 682280 (2d Cir. June 13, 2001); *United States* v. *Jorge-Carlos*, No. 00-1684, 2001 WL 514300 (2d Cir. May 15, 2001); *United States* v. *Cruz-Garcia*, No. 00-1775, 2001 WL 498115 (2d Cir. May 10, 2001); *United States* v. *LaPorte*, No. 00-1742, 2001 WL 498113 (2d Cir. May 9, 2001); *United States* v. *Perez*, No. 00-1692, 2001 WL 300530 (2d Cir. Mar. 28, 2001); *United States* v. *Martinez-Cuadros*, No. 00-1454, 2001 WL 290117 (2d Cir. Mar. 23, 2001); *United States* v. *Artega*, No. 00-1638, 2001 WL 266321 (2d Cir. Mar. 19, 2001); *United States* v. *Caminero*, No. 00-1414, 2001 WL 266310 (2d Cir. Mar. 19, 2001).

Fourth Circuit. *United States* v. *Arevalo-Martinez*, No. 00-4680, 2001 WL 929893 (4th Cir. Aug. 16, 2001); *United States* v. *Floyd*, No. 00-4817, 2001 WL 880118 (4th Cir. Aug. 6, 2001); *United States* v. *Macedo-Molina*, No. 00-4925, 2001 WL 822426 (4th Cir. July 20, 2001); *United States* v.

Bustos-Castaneda, No. 00-4867, 2001 WL 543330 (4th Cir. May 23, 2001); *United States* v. *Mack*, No. 00-4832, 2001 WL 434850 (4th Cir. Apr. 30, 2001); *United States* v. *Zepeda-Olivas*, No. 00-4363, 2001 WL 409502 (4th Cir. Apr. 23, 2001); *United States* v. *Hernandez-Gutierrez*, No. 00-4642, 2001 WL 378312 (4th Cir. Apr. 16, 2001); *United States* v. *Almendarez*, No. 00-4421, 2001 WL 37544, at *1 (4th Cir. Jan. 16, 2001); *United States* v. *Sandoval-Rocca*, No. 00-4474, 2000 WL 1836771 (4th Cir. Dec. 14, 2000).

Fifth Circuit. *United States* v. *Moreno-Arredondo*, 255 F.3d 198, 202–203 (5th Cir. 2001); *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 507 (5th Cir. 2001); *United States* v. *Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001); *United States* v. *Nava-Perez*, 242 F.3d 277, 279 (5th Cir. 2001); *United States* v. *Cuevas-Andrade*, 232 F.3d 440, 443 n.1 (5th Cir. 2000); *United States* v. *Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000); see also *United States* v. *Landeros-Gonzales*, No. 01-10066, 2001 WL 921456, at *2 n.1 (5th Cir. Aug. 14, 2001).

Sixth Circuit. *United States* v. *Newhausser*, 241 F.3d 460 (6th Cir. 2001); *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (en banc); see also *United States* v. *Dwyer*, No. 99-2483, 2001 WL 845558 (6th Cir. July 16, 2001). *United States* v. *Caldwell*, No. 99-6031, 2000 WL 1888682 (6th Cir. Dec. 19, 2000).

Seventh Circuit. *United States* v. *Skidmore*, 254 F.3d 635, 642 (7th Cir. 2001); *United States* v. *Jones*, 245 F.3d 645, 649 (7th Cir. 2001); *United States* v. *Brough*, 243 F.3d 1078, 1081 (7th Cir. 2001); see also *United States* v. *Palomino-Rivera*, No. 00-3640, 2001 WL 818791, at *5 (7th Cir. July 20, 2001); *Dahler* v. *United States*, No. 01-2591, 2001 WL 827643, at *3 (7th Cir. July 17, 2001); *United States* v. *Nunes*, No. 01-1120, 2001 WL 505971 (7th Cir. May 11, 2001); *United States* v. *Whitt*, No. 99-2017, 2001 WL 114734 (7th Cir. Feb. 7, 2001).

Eighth Circuit. *United States* v. *Raya-Ramirez*, 244 F.3d 976 (8th Cir. 2001); *United States* v. *Rush*, 240 F.3d 729, 731 (8th Cir. 2001); *United States* v. *Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); see also *United States* v. *Davis*, No. 00-3624, 2001 WL 914199, at *2 (8th Cir. Aug. 15, 2001); *United States* v. *Phipps*, No. 01-1289WM, 2001 WL 893837, at *1 (8th Cir. Aug. 9, 2001); *United States* v. *Maynie*, Nos. 00-1264, 00-1269, 00-1271, 2001 WL 856142, at *7 (8th Cir. July 30, 2001); *United States* v. *Aguilar-Neri*, No. 01-1002, 2001 WL 792555 (8th Cir. July 16, 2001); *United States* v. *Napoles-Garcia*, No. 01-1296, 2001 WL 641564 (8th Cir. June 12, 2001); *United States* v. *Yanez-Dominguez*, No. 00-2272, 2001 WL 575461 (8th Cir. May 30, 2001); *United States* v. *Nelson*, No. 00-3858, 2001 WL 548577, at *2 (8th Cir. May 24, 2001); *United States* v. *Lomas-Flores*, No. 00-3760, 2001 WL 548571 (8th Cir. May 24, 2001); *United States* v. *Ramirez-Gil*, No. 00-3532, 2001 WL 306091 (8th Cir. Mar. 30, 2001); *United States* v. *Gutierrez-Lopez*, No. 00-3832, 2001 WL 274093 (8th Cir. Mar. 21, 2001); *United States* v. *Olvera-Yanez*, No. 00-3852, 2001 WL 214102 (8th Cir. Mar. 6, 2001); *United States* v. *Abundis-Quesedas*, No. 00-3580, 2001 WL 214086 (8th Cir. Mar. 6, 2001); *United States* v. *Cortez-Delatorre*, No. 00-2066, 2000 WL 1665078 (8th Cir. Nov. 7, 2000).

Ninth Circuit. *United States* v. *Hayden*, 255 F.3d 768, 774 (9th Cir. 2001); *United States* v. *Reyes-Pacheco*, 248 F.3d 942, 944–945 (9th Cir. 2001); *United States* v. *Arellano-Rivera*, 244 F.3d 1119, 1127 (9th Cir. 2001); *United States* v. *Castillo-Rivera*, 244 F.3d 1020, 1024–1025 (9th Cir. 2001); *United States* v. *Camarillo-Tello*, 236 F.3d 1024, 1025 n.2 (9th Cir. 2001); *Hoffman* v. *Arave*, 236 F.3d 523, 545 (9th Cir. 2001); *United States* v. *Quintana-Torres*, 235 F.3d 1197, 1200 (9th Cir. 2000); *United States* v. *Fresnares-Torres*, 235 F.3d 481, 482 (9th Cir. 2000); *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 413–414 (9th Cir. 2000); see also *United States* v. *Salas-Rivera*, No. 00-50683, 2001 WL 936620, at *1 (9th Cir. Aug. 17, 2001); *United States* v. *Diaz-Pineda*, No. 00-10357, 2001 WL 921313 (9th Cir. Aug. 14, 2001); *United States* v. *Buckland*, No. 99-30285, 2001 WL 893440, n.4 (9th Cir. Aug. 9, 2001); *United States* v. *Ramirez-Garcia*, No. 00-10346, 2001 WL 868440, at *2 (9th Cir. Aug. 1, 2001); *United States* v. *Bojorquez-Bracamontes*, No. 00-50766, 2001 WL 868273 (9th Cir. July 31, 2001); *United States* v. *Jimenez*, No. 00-10343, 2001 WL 856109, at *1 n.2 (9th Cir. July 31, 2001); *United States* v. *Rivera-Alonzo*, No. 00-10418, 2001 WL 841069 (9th Cir. July 25, 2001); *United States* v. *Chavaria-Angel*, No. 00-10465, 2001 WL 827831 (9th Cir. July 23, 2001); *United States* v. *Moya-Avila*, No. 00-50185, 2001 WL 827822 (9th Cir. July 23, 2001); *United States* v. *Moralez-Pereyra*, No. 00-50206, 2001 WL 827755 (9th Cir. July 23, 2001); *United States* v. *Ortega-Ramirez*, No. 00-50396, 2001 WL 827660 (9th Cir. July 23, 2001); *United States* v. *Navarro-Torrez*, No. 00-10044, 2001 WL 827603 (9th Cir. July 23, 2001); *United States* v. *Flores-Cardona*, No. 00-30407, 2001 WL 823832 (9th Cir. July 20, 2001); *United States* v. *Bishop*, No. 00-10454, 2001 WL 823736 (9th Cir. July 20, 2001); *United States* v. *Beltran-Angulo*, No. 00-10466, 2001 WL 823732 (9th Cir. July 20, 2001); *United States* v. *Cezberg-Loarca*, No. 00-10512, 2001 WL 823731 (9th Cir. July 20, 2001); *United States* v. *Hernandez-Rangel*, No. 00-10569, 2001 WL 823725 (9th Cir. July 20, 2001); *Cruz-Aguilar* v. *United States*, No. 00-10441, 2001 WL 820918 (9th Cir. July 19, 2001); *United States* v. *Perez-Rios*, No. 99-50674, 2001 WL 820914 (9th Cir. July 19, 2001); *United States* v. *Reyes-Salgado*, No. 00-10331, 2001 WL 804119 (9th Cir. July 17, 2001); *United States* v. *Avila*, No. 00-10595, 2001 WL 777441 (9th Cir. July 11, 2001); *United States* v. *Lomeli-Diaz*, No. 00-50765, 2001 WL 710648 (9th Cir. June 25, 2001); *United States* v. *Mateo-Mendez*, No. 00-50721, 2001 WL 710647 (9th Cir. June 25, 2001); *United States* v. *Salgado-Castillo*, No. 00-50254, 2001 WL 710646 (9th Cir. June 25, 2001); *United States* v. *Garcia-Lonzo*, No. 00-50208, 2001 WL 710645 (9th Cir. June 25, 2001); *United States* v. *Romero-Cortez*, No. 00-30279, 2001 WL 700767 (9th Cir. June 21, 2001); *United States* v. *Santos-Rios*, No. 00-10545, 2001 WL 700573 (9th Cir. June 21, 2001); *United States* v. *Rodriguez-Osorio*, No. 00-10478, 2001 WL 700569 (9th Cir. June 21, 2001); *United States* v. *Barreto-Guzman*, No. 00-10436, 2001 WL 700567, at *2 (9th Cir. June 21, 2001); *United States* v. *Mattis*, No. 00-50501, 2001 WL 706920, at *3 n.2 (9th Cir. June 20, 2001); *United States* v. *de la Torre-Chavez*, No. 00-50051, 2001 WL 599619 (9th Cir. June 1, 2001); *United States* v. *Rodriguez-Jimenez*, No. 00-50124, 2001

WL 599618 (9th Cir. June 1, 2001); *United States* v. *Garcia-Pena*, No. 00-50183, 2001 WL 599465 (9th Cir. June 1, 2001); *United States* v. *Pacheco-Ramos*, No. 00-50201, 2001 WL 599302 (9th Cir. June 1, 2001); *United States* v. *Aguirre-Trueva*, No. 00-50369, 2001 WL 599246 (9th Cir. June 1, 2001); *United States* v. *Tafoya-Gonzales*, No. 00-50374, 2001 WL 599245 (9th Cir. June 1, 2001); *United States* v. *Aguirre-Rea*, No. 00-50486, 2001 WL 599242 (9th Cir. June 1, 2001); *United States* v. *Camarillo-Vasquez*, No. 00-10293, 2001 WL 584153 (9th Cir. May 30, 2001); *United States* v. *Zedillo-Camarillo*, No. 00-10381, 2001 WL 584149 (9th Cir. May 30, 2001); *United States* v. *Barajas-Serrato*, No. 00-10408, 2001 WL 584148 (9th Cir. May 30, 2001); *United States* v. *Villa-Lozano*, No. 00-10429, 2001 WL 584147 (9th Cir. May 30, 2001); *United States* v. *Lucena*, No. 00-10490, 2001 WL 583166 (9th Cir. May 30, 2001); *United States* v. *Pacheco-Adame*, No. 00-10531, 2001 WL 583163 (9th Cir. May 30, 2001); *United States* v. *Cervantes-Morales*, No. 00-10536, 2001 WL 583155 (9th Cir. May 30, 2001); *United States* v. *Santibanez-Ramirez*, No. 00-10555, 2001 WL 583143 (9th Cir. May 30, 2001); *United States* v. *Figueroa-Garcia*, No. 00-10568, 2001 WL 583141 (9th Cir. May 30, 2001); *United States* v. *Arriaga-Arroyo*, No. 00-10594, 2001 WL 583139 (9th Cir. May 30, 2001); *United States* v. *Prieto-Molinar*, No. 00-50546, 2001 WL 577024 (9th Cir. May 29, 2001); *United States* v. *Magallon-Guerrero*, No. 99-50801, 2001 WL 577016 (9th Cir. May 29, 2001); *United States* v. *Campos-Chavez*, No. 99-50697, 2001 WL 577013 (9th Cir. May 29, 2001); *United States* v. *Rodriguez-Cosio*, No. 99-50679, 2001 WL 569141 (9th Cir. May 25, 2001); *United States* v. *Reynaga-Fregozo*, No. 99-50682, 2001 WL 569139 (9th Cir. May 25, 2001); *United States* v. *Martinez-Ceballoz*, No. 00-10059, 2001 WL 548996 (9th Cir. May 22, 2001); *United States* v. *Perez*, No. 00-10268, 2001 WL 537770 (9th Cir. May 18, 2001); *United States* v. *Boustan*, No. 99-10616, 2001 WL 521317 (9th Cir. May 15, 2001); *United States* v. *Valdez-Romero*, No. 00-10475, 2001 WL 488902 (9th Cir. May 8, 2001); *United States* v. *Valencia-Gonzalez*, No. 99-50010, 2001 WL 408942 (9th Cir. Apr. 19, 2001); *United States* v. *Saavedra-Martinez*, No. 99-50124, 2001 WL 408921 (9th Cir. Apr. 19, 2001); *United States* v. *Zamora-Rivera*, No. 99-50240, 2001 WL 408907 (9th Cir. Apr. 19, 2001); *United States* v. *Rodriguez-Llamas*, No. 99-50347, 2001 WL 408898 (9th Cir. Apr. 19, 2001); *United States* v. *Murillo-Contreras*, No. 99-50737, 2001 WL 408894 (9th Cir. Apr. 19, 2001); *United States* v. *Cisneros-Valdez*, No. 00-10315, 2001 WL 408884 (9th Cir. Apr. 19, 2001); *United States* v. *Escobar-Perez*, No. 00-10363, 2001 WL 408877 (9th Cir. Apr. 19, 2001); *United States* v. *Chavez-Ortega*, No. 00-10365, 2001 WL 408875 (9th Cir. Apr. 19, 2001); *United States* v. *Villegas-Lara*, No. 00-10413, 2001 WL 408800 (9th Cir. Apr. 19, 2001); *United States* v. *Pulido-Noriega*, No. 00-10453, 2001 WL 408796 (9th Cir. Apr. 19, 2001); *United States* v. *Vergel-Garcia*, No. 00-50026, 2001 WL 408788 (9th Cir. Apr. 19, 2001); *United States* v. *Alcantar-Murillo*, No. 00-50146, 2001 WL 408786 (9th Cir. Apr. 19, 2001); *United States* v. *Palacios-Lizarraga*, No. 00-50209, 2001 WL 408785 (9th Cir. Apr. 19, 2001); *United States* v. *Rivas-Ayala*, No. 00-50260, 2001 WL 408783 (9th Cir. Apr. 19, 2001); *United States* v. *Porras-Rodriguez*, No. 00-50277,

2001 WL 408782 (9th Cir. Apr. 19, 2001); *United States* v. *Magana-Ojeda*, No. 00-50293, 2001 WL 408775 (9th Cir. Apr. 19, 2001); *United States* v. *Sanchez-Rodriguez*, No. 00-50398, 2001 WL 408773 (9th Cir. Apr. 19, 2001); *United States* v. *Jimenez*, No. 00-50072, 2001 WL 399474 (9th Cir. Apr. 18, 2001); *United States* v. *Peralta-Moran*, No. 00-30031, 2001 WL 399471 (9th Cir. Apr. 18, 2001); *United States* v. *Zamudio-Orozco*, No. 00-30195, 2001 WL 357512 (9th Cir. Apr. 10, 2001); *United States* v. *Meza-Casillas*, No. 00-10282, 2001 WL 357522 (9th Cir. Apr. 9, 2001); *United States* v. *Chaires-Rodarte*, No. 99-50514, 2001 WL 312386 (9th Cir. Mar. 29, 2001); *United States* v. *Obregon-Segura*, No. 00-50430, 2001 WL 306719 (9th Cir. Mar. 28, 2001); *United States* v. *Munoz-Hernandez*, No. 00-50119, 2001 WL 306713 (9th Cir. Mar. 28, 2001); *United States* v. *Medina-Arias*, No. 00-50007, 2001 WL 306712 (9th Cir. Mar. 28, 2001); *United States* v. *Gutierrez-Herrera*, No. 99-50805, 2001 WL 311323 (9th Cir. Mar. 28, 2001); *United States* v. *Renteria-Almodovar*, No. 00-10229, 2001 WL 294316 (9th Cir. Mar. 26, 2001); *United States* v. *Mendoza-Sandoval*, No. 00-10273, 2001 WL 291146, at *1 (9th Cir. Mar. 22, 2001); *United States* v. *Alexander*, No. 99-50681, 2001 WL 291045 (9th Cir. Mar. 22, 2001); *United States* v. *Juarez-Tafoya*, No. 99-50675, 2001 WL 291044 (9th Cir. Mar. 22, 2001); *United States* v. *Moreno-Galindo*, No. 99-50348, 2001 WL 291039 (9th Cir. Mar. 22, 2001); *United States* v. *Quinones-Garcia*, No. 99-50110, 2001 WL 291038 (9th Cir. Mar. 22, 2001); *United States* v. *Cruz-Ortiz*, No. 99-50012, 2001 WL 291036 (9th Cir. Mar. 12, 2001); *United States* v. *Garcia-Amaro*, No. 00-50304, 2001 WL 231905 (9th Cir. Mar. 8, 2001); *United States* v. *Ramirez-Meija*, No. 00-50248, 2001 WL 231459 (9th Cir. Mar. 8, 2001); *United States* v. *Arreola-Trasvina*, No. 99-50711, 2001 WL 230531 (9th Cir. Mar. 8, 2001); *United States* v. *Yedra*, No. 00-30151, 2001 WL 219913 (9th Cir. Mar. 5, 2001); *United States* v. *Palomares-Munoz*, No. 00-50216, 2001 WL 219951, at *2 (9th Cir. Mar. 5, 2001); *United States* v. *Perez-Espino*, No. 00-50019, 2001 WL 206005 (9th Cir. Feb. 28, 2001); *United States* v. *Arellano-Sandoval*, No. 00-10057, 2001 WL 180839 (9th Cir. Feb. 23, 2001); *United States* v. *Dabbas*, No. 00-50487, 2001 WL 180468 (9th Cir. Feb. 23, 2001); *United States* v. *Narvaez*, No. 00-50394, 2001 WL 180436 (9th Cir. Feb. 23, 2001); *United States* v. *Gomez-Pineda*, No. 00-50312, 2001 WL 180432 (9th Cir. Feb. 23, 2001); *United States* v. *Robles-Macias*, No. 00-50001, 2001 WL 180414 (9th Cir. Feb. 23, 2001); *United States* v. *Alvarado*, No. 00-50226, 2001 WL 180407 (9th Cir. Feb. 23, 2001); *United States* v. *Arevalos-Barrios*, No. 00-50311, 2001 WL 180368 (9th Cir. Feb. 23, 2001); *United States* v. *Alvarez-Gonzalez*, No. 00-50165, 2001 WL 180367 (9th Cir. Feb. 23, 2001); *United States* v. *Alvarado-Gongora*, No. 99-50782, 2001 WL 180570 (9th Cir. Feb. 22, 2001); *United States* v. *Paredes-Hernandez*, No. 00-10389, 2001 WL 180569 (9th Cir. Feb. 22, 2001); *United States* v. *Bonilla-Guzman*, No. 00-10359, 2001 WL 180568 (9th Cir. Feb. 22, 2001); *United States* v. *Ramirez-Vargas*, No. 00-10335, 2001 WL 180567 (9th Cir. Feb. 22, 2001); *United States* v. *Robles-Frias*, No. 00-10294, 2001 WL 180565 (9th Cir. Feb. 22, 2001); *United States* v. *Fuertes-Ramos*, No. 00-10255, 2001 WL 180564 (9th Cir. Feb. 22, 2001); *United States* v. *Hernandez-*

Bautista, No. 00-10130, 2001 WL 180562 (9th Cir. Feb. 22, 2001); *United States* v. *Miranda-Gastelum*, No. 00-10009, 2001 WL 180557 (9th Cir. Feb. 22, 2001); *United States* v. *Sanchez-Sanchez*, No. 00-30266, 2001 WL 180541 (9th Cir. Feb. 22, 2001); *United States* v. *Roldan-Palacios*, No. 00-10438, 2001 WL 180506 (9th Cir. Feb. 22, 2001); *United States* v. *Lozano-Hernandez*, No. 99-50453, 2001 WL 176874 (9th Cir. Feb. 21, 2001); *United States* v. *Encisco-Aceves*, No. 99-50431, 2001 WL 176873 (9th Cir. Feb. 21, 2001); *United States* v. *Ortega-Ramirez*, No. 99-50226, 2001 WL 174614 (9th Cir. Feb. 21, 2001); *United States* v. *Loya-Chavez*, No. 99-10583, 2001 WL 115009, at *1 (9th Cir. Feb. 8, 2001); *United States* v. *Aguilar-Rodriguez*, No. 99-10574, 2001 WL 83199 (9th Cir. Jan. 31, 2001); *United States* v. *Carrera-Reyes*, No. 00-50336, 2001 WL 66288 (9th Cir. Jan. 25, 2001); *United States* v. *Martinez-Lomeli*, No. 00-50301, 2001 WL 66283 (9th Cir. Jan. 25, 2001); *United States* v. *Herrera-Ramirez*, No. 00-50040, 2001 WL 66265 (9th Cir. Jan. 25, 2001); *United States* v. *Magana-Urbanes*, No. 00-30144, 2001 WL 66253 (9th Cir. Jan. 25, 2001); *United States* v. *Zambrano-Ayala*, No. 99-30300, 2001 WL 68638 (9th Cir. Jan. 24, 2001); *United States* v. *Morales-Escobedo*, No. 99-50768, 2001 WL 68620 (9th Cir. Jan. 24, 2001); *United States* v. *Martinez-Acosta*, No. 00-10045, 2001 WL 68486 (9th Cir. Jan. 24, 2001); *United States* v. *Chavez-Barraza*, No. 00-30015, 2001 WL 68313 (9th Cir. Jan. 24, 2001); *United States* v. *Patino-Salazar*, No. 99-50082, 2001 WL 51514, at **1–2 (9th Cir. Jan. 22, 2001); *United States* v. *Ledezma-Amezquita*, No. 00-50191, 2000 WL 1875816 (9th Cir. Dec. 26, 2000); *United States* v. *Miranda-Garcia*, No. 00-50081, 2000 WL 1868242 (9th Cir. Dec. 20, 2000); *United States* v. *Gomez-Valdovinos*, No. 00-50097, 2000 WL 1868238 (9th Cir. Dec. 20, 2000); *United States* v. *Orozco-Rangel*, No. 99-50800, 2000 WL 1868227 (9th Cir. Dec. 20, 2000); *United States* v. *Esponda-Ventura*, No. 99-50696, 2000 WL 1861822 (9th Cir. Dec. 18, 2000); *United States* v. *Valdovino-Torres*, No. 99-50599, 2000 WL 1256891 (9th Cir. Sept. 5, 2000).

Tenth Circuit. *United States* v. *Wilson*, 244 F.3d 1208, 1216–1217 (10th Cir. 2001); *United States* v. *Dorris*, 236 F.3d 582, 587 (10th Cir. 2000); *United States* v. *Martinez-Villalva*, 232 F.3d 1329, 1332 (10th Cir. 2000); see also *United States* v. *Arroyos-Serna*, No. 01-2010, 2001 WL 939783 (10th Cir. Aug. 17, 2001); *United States* v. *Rivera-Alvarez*, No. 01-1083, 2001 WL 845294 (10th Cir. July 26, 2001); *United States* v. *Tapia*, No. 00-6408, 2001 WL 799198 (10th Cir. July 16, 2001); *United States* v. *Corral-Caraveo*, No. 00-1514, 2001 WL 776933 (10th Cir. July 11, 2001); *United States* v. *Gutierrez-Hernandez*, No. 00-4208, 2001 WL 747802 (10th Cir. July 3, 2001); *United States* v. *Sallas-Moreno*, No. 00-4199, 2001 WL 744972 (10th Cir. July 3, 2001); *United States* v. *Mendias-Chavez*, No. 00-3412, 2001 WL 618170 (10th Cir. June 5, 2001); *United States* v. *Orantes-Mendez*, No. 00-3358, 2001 WL 617930 (10th Cir. June 5, 2001); *United States* v. *Camacho-Jimenez*, No. 00-4154, 2001 WL 589935 (10th Cir. June 1, 2001); *United States* v. *Guajardo-Hernandez*, No. 00-3357, 2001 WL 578485 (10th Cir. May 30, 2001); *United States* v. *Rodriguez-Hernandez*, No. 00-1418, 2001 WL 491130 (10th Cir. May 9, 2001); *United States* v. *Key*, No. 00-6343, 2001 WL 435248 (10th Cir. Apr. 30, 2001); *United States*

flood of litigation to continue unabated until the lower courts receive the definitive answer that this Court alone can provide.

The court below was, of course, correct that no court of appeals to consider the issue has concluded that the reasoning of *Almendarez-Torres* must yield in the face of an *Apprendi*-based argument on the recidivism issue. (App. 4a n.3). Yet it would be an error to conclude from this, as the court of appeals apparently did, that the arguments in Petitioner's favor lack merit. The consistency of the decisions in the lower courts reflects, not a judicial consensus in favor of the reasoning of *Almendarez-Torres*, but mere obedience to the settled rule that only this Court may declare one of its precedents to be overruled.[47] The decisions of many of the courts of appeals that have considered the issue reflect that, irrespective of their own views on the proper resolution of the tension between *Apprendi* and *Almendarez-Torres*, the courts believe themselves compelled to await this Court's definitive word.[48]

Prudential considerations well commend Petitioner's case

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v. *Romero*, No. 00-2478, 2001 WL 427957, at *3 n.4 (10th Cir. Apr. 26, 2001); *United States* v. *Moreno*, No. 00-1458, 2001 WL 280252, at **1–2 (10th Cir. Mar. 22, 2001); *United States* v. *Suarez-Morales*, No. 00-1427, 2001 WL 280247 (10th Cir. Mar. 22, 2001); *United States* v. *Salazar*, No. 00-1398, 2001 WL 280219, at *1 (10th Cir. Mar. 22, 2001); *United States* v. *Chavez*, No. 00-1392, 2001 WL 280201, at *1 (10th Cir. Mar. 22, 2001). *United States* v. *Alamanza-Antuna*, No. 00-4129, 2001 WL 46313 (10th Cir. Jan. 19, 2001).

Eleventh Circuit. *United States* v. *Padilla-Reyes*, 247 F.3d 1158, 1161 (11th Cir. 2001); *United States* v. *Thomas*, 242 F.3d 1028 (11th Cir. 2001); *United States* v. *Guadamuz-Solis*, 232 F.3d 1363 (11th Cir. 2000).

47. See, *e.g.*, *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

48. See *United States* v. *Terry*, 240 F.3d 65, 73–74 (1st Cir. 2001) ("until *Almendarez-Torres* is overruled, we are bound by it"); *United States* v. *Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) ("Unless and until *Almendarez-Torres* is overruled by the Supreme Court, we must follow it."); *United States* v. *Dabeit*, 231 F.3d 979, 984 (5th Cir. 2000) ("we are compelled to follow faithfully a directly controlling Supreme Court precedent * * * even if, in a particular case, it seems pellucidly clear * * * that, given the opportunity, the Supreme Court would overrule its precedent") (internal quotations and citation omitted); *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (en banc) ("Although the Court's decision in *Apprendi* arguably casts doubt on the correctness of the holding in *Almendarez-Torres*, * * * *Almendarez-Torres* remains the law.").

for review because, unlike in *Apprendi*, the recidivism issue is both squarely presented and case-dispositive. If *Almendarez-Torres* is still good law on this point, then the court of appeals may have been correct to conclude that the applicable statutory maximum penalty for Petitioner's offense under 21 U.S.C. § 841(b)(1)(C) was 30 years, notwithstanding the indictment's failure to charge that prior conviction and the court's failure to submit the issue for resolution by the jury. On the other hand, if *Almendarez-Torres* was incorrectly decided as *Apprendi* suggests, then (as even the court of appeals recognized, App. 4a) Petitioner's 25-year prison sentence is unconstitutional, for it exceeds the 20-year maximum sentence authorized by the jury's verdict. Because Petitioner's 25-year sentence falls between the 20-year base maximum of Subparagraph 841(b)(1)(C) and the higher 30-year maximum the statute authorizes upon proof of prior conviction, the question whether the prior conviction provision defines an element of the offense—in other words, the question whether *Almendarez-Torres* was wrongly decided—is outcome-determinative on the facts of Petitioner's case.

In sum, this case presents a substantial constitutional issue, the resolution of which is of consequence to this case and many other cases nationwide, but upon which the lower courts are disabled from opining because of the settled rule that only this Court can overturn one of its precedents. Whether one agrees or disagrees with the rule of *Almendarez-Torres*, it is vitally important to settle, one way or the other, the question whether prior conviction provisions that alter the statutory maximum penalty (such as that of 21 U.S.C. § 841(b)(1)(C)) do, or do not, define a separate element of the offense. The issue manifestly constitutes "an important question of federal law that has not been, but should be, settled by this Court[.]"[49] Taking the reasoning of *Apprendi* and *Jones* to its logical conclusion suggests that *Almendarez-Torres* must be overruled. To give the lower courts the definitive resolution of this issue that this Court alone can provide, and reclaim the judicial resources that would otherwise be lost to ongoing relitigation of the issue in hundreds of pending and future cases in the lower courts, the writ should issue.

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49. S. Ct. R. 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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AUGUST 2001

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3632

UNITED STATES OF AMERICA
v.
DERRICK MICHAEL MCCAIN, aka SKIP
Derrick Michael McCain,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 95-cr-00036-8)
District Judge: Honorable Robert J. Cindrich

Submitted Under Third Circuit LAR 34.1(a)
April 6, 2001
Before: SLOVITER, MANSMANN and GREENBERG,
Circuit Judges.

(Filed April 9, 2001)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Derrick Michael McCain appeals from a Judgment in a Criminal Case entered following his conviction by a jury on one count of conspiracy to possess cocaine and cocaine base with intent to distribute in violation of 21 U.S.C. § 846. McCain focuses on the sentence imposed, contending that the District Court committed plain error when it determined his sentence based on drug quantities that were neither alleged in the indictment nor submitted to the jury. Because we are convinced that

this allegation of error lacks merit, we will affirm the Judgment in a Criminal Case.

I.

The parties are familiar with the facts underlying this matter. Accordingly we recount only a brief procedural history.

In July 1995 McCain was named in one count of a twenty-count superseding indictment returned by a federal grand jury sitting in the Western District of Pennsylvania. McCain was charged with conspiracy to possess cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. § 846. The drug quantity was not specified in the indictment. In April 1996 McCain was tried and convicted by a jury on the conspiracy charge. The jury was not asked to and did not determine the quantity of drugs attributable to McCain.

At sentencing, the parties disputed the drug amounts for which McCain was responsible. The District Court found, by a preponderance of the evidence, that McCain was responsible for 8.8 kilograms of cocaine and for 350 grams of cocaine base. At sentencing, it was undisputed that McCain had a previous conviction in a Pennsylvania state court for a drug-related offense defined as a felony under Pennsylvania law.

Taking into account the drug quantity and McCain's previous conviction, the District Court assigned McCain a base offense level of 36 in criminal history category V and sentenced him to a 300-month term of imprisonment—at the lower end of the applicable 292–365 month guideline sentencing range—and to a 10-year period of supervised release.

On January 6, 1998, McCain filed an untimely *pro se* notice of appeal, which the government moved to dismiss. We denied the government's motion, ordering that the matter be remanded to the District Court "for resentencing in accordance with Rule 32 so that [McCain's] right to appeal his conviction and sentence [would] be restored." *United States v. McCain*, No. 98-3076, order (3d Cir. Oct. 7, 1998).

On remand, the District Court appointed new counsel for McCain and reimposed the sentence entered earlier. McCain filed a timely appeal supported by an *Anders* brief prepared by his attorney and by a supplemental *pro se* brief which raised, among others, the following question: "[W]hether the District

Court committed plain error in failing to instruct the jury that it must determine the quantities of cocaine and cocaine base involved in McCain's offense." On July 10, 2000 we found arguable merit in this one issue. Because the issue was not raised by McCain's appointed counsel, we ordered that new counsel be appointed.

We now consider McCain's contention that the District Court erred in determining his sentence based on drug quantities found by the Court, but not alleged in the indictment or submitted to the jury. Because this issue was not raised in the District Court, we apply a plain error standard of review.

II.

McCain's challenges to the sentence imposed hinge on the applicability of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). McCain argues that the holding in *Apprendi* "compels the conclusion that drug quantities references in Section 841(b)(1)[1] are elements of the offense that must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt." According to McCain, the District Court committed plain error when it treated the quantity of drugs attributable to him as a "mere sentencing factor."

"[I]n *Apprendi*, ... the Supreme Court held as a matter of constitutional law that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *United States*

1. McCain was convicted of conspiring to violate the provisions of 21 U.S.C. § 841, in violation of 21 U.S.C. § 846; all of the elements necessary to this conviction were set forth in the superseding indictment. Those found guilty of conspiracy pursuant to section 846 are "subject to the same penalties as those prescribed" for the offense they conspired to commit." 21 U.S.C. § 841. Penalties applicable to violations of Section 841(a) are set forth at section 841(b)(1). Sections 841(b)(1)(A) and (B) provide for different ranges of penalties depending on the quantity of drugs at issue. Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years [240 months]" where a defendant has been found guilty of an offense involving an unspecified quantity of a Schedule I or Schedule II controlled substance. Where a defendant is found guilty "after a prior conviction for a felony drug offense has become final," Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 30 years [360] months."

v. Baltas, 236 F.3d 27, 40 (1st Cir. 2001) (quoting *Apprendi*, 120 S. Ct. at 2362–63).

Under the facts of this case, the holding in *Apprendi*, is not implicated. Had McCain been sentenced to a term of imprisonment greater than 20 years based solely upon the District Court's determination of quantity, there would be an *Apprendi* issue. Here, however, the sentence imposed by the District Court was calculated not only with reference to drug amounts; because McCain admitted that he had a previous state conviction for a drug-related felony, he was subject to a maximum 30-year term of imprisonment pursuant to section 841(b)(1)(C), regardless of the quantity of drugs underlying his federal conspiracy conviction.[2] Because McCain's 300-month sentence was less than the 30-year statutory maximum applicable to a defendant found guilty of a drug offense involving *any amount* of cocaine or cocaine base, his sentence was not "more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 120 S. Ct. at 2361 n. 13.

Although McCain invites us to repudiate it here, *Apprendi* did not overrule the Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 239–47 (1988), that a prior conviction may be treated as a sentencing factor even where, as a result of the conviction, a defendant receives a sentence beyond the statutory maximum. The reach of the rule announced in *Apprendi* certainly does not extend to cover cases where, as here, a defendant is sentenced to a term less than the applicable statutory maximum. *United States v. Cepero*, 224 F.3d 256, 267–68 n.5 (3d Cir.), *cert. denied*, 121 S. Ct. 861 (2000).[3] The District Court did not commit error, plain or otherwise, in sentencing McCain to a 300-month term of imprisonment.

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2. Even had the sentence been determined with reference to drug amounts alone, McCain could not succeed in demonstrating that the District Court committed plain error in formulating his sentence. Because he was, in any event, subject to a 30-year maximum term under section 841(b)(1)(C), McCain cannot demonstrate that he was prejudiced by the sentence imposed. *See United States v. Stevens*, 223 F.3d 239, 242 (3d Cir. 2000), *cert. denied*, 2001 WL 38699 (U.S. Feb. 20, 2001) (No. 00-7927).

3. None of our sister courts of appeals has reached a different conclusion.

III.

In accordance with the applicable "plain error" standard of review, we also decline to disturb the District Court's imposition of a 10-year term of supervised release. Most courts of appeals to have addressed maximum terms of supervised release have held that a District Court may impose any term of release greater than the three year minimum specified in section 841(b)(1)(C). *See, e.g., United States v. Gerrow*, 232 F.3d 831, 835 (11th Cir. 2000). Under this view, the 10-year term imposed here would not have exceeded the statutory maximum. Even if we were to adopt a contrary view, we would not agree that the District Court's imposition of the 10-year term rose to the level of plain error. The Supreme Court has not addressed this issue, nor have we. "Not only are the ... circuits split, but the majority of them have resolved [this issue] against the position [McCain] take[s] here. Accordingly, the district court would not have committed plain error in imposing terms of supervised release in excess of three years, regardless of the quantity of drugs involved." *Id.* at 835.

IV.

Because we are convinced that each of the allegations of error raised here lacks merit, we will affirm the Judgment in a Criminal Case.

To the Clerk:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3632

UNITED STATES OF AMERICA
v.
DERRICK MICHAEL MCCAIN, aka SKIP
Derrick Michael McCain,
Appellant

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO,
FUENTES and GREENBERG, *Circuit Judges*.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

29 MAY 2001

*Judge Greenberg's vote was limited to panel rehearing.

STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE

United States Constitution, 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 21, United States Code, Section 841

21 U.S.C. § 841. Prohibited acts A.

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable

amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life impris-

onment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance

containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life impris-

onment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the

greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance

with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of-title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or inten-

tionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution.—

(A) In general.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub. L. 98-473, title II, § 224(a)(2), formerly § 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, § 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals
Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to

trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty
In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

Title 21, United States Code, Section 846

21 U.S.C. § 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.